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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RON NECHEMIA et al., Plaintiffs and Respondents, v. XIAOXI LI, Defendant and Appellant.	B257471 (Los Angeles County Super. Ct. No. BC506938)

APPEAL from an order of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Reversed with directions.

Law Office of Martin L. Horwitz and Martin L. Horwitz for Defendant and Appellant.

Harbin & McCarron, Andrew McCarron and Michael L. Parker for Plaintiffs and Respondents.

Plaintiffs Ron Nechemia and Eurorient Financial Group obtained a $1 million default judgment against defendant Xiaoxi Li after Li failed to answer their complaint.[1] The trial court found Li's subsequent motion for relief under Code of Civil Procedure section 473[2] (section 473) to be unclear as to whether she sought discretionary or mandatory relief. Treating the motion as seeking only discretionary relief, the court found her attorney's admitted neglect was inexcusable and denied the motion. Li argues on appeal that the trial court was required to grant relief under the mandatory relief provision of section 473 for attorney fault. We agree, and therefore reverse the judgment.

BACKGROUND

On October 26, 2013, Nechemia and Eurorient, a global development finance institution, served Li, Nechemia's ex-wife, with a defamation complaint they had filed in April 2014 regarding Li's engaging in a widespread campaign falsely accusing Nechemia of illegal and immoral activities, investment fraud, spousal battery, extramarital affairs, pregnancies out of wedlock, coerced abortions, fraudulent United Nations credentials, Nazism, and advocacy for the overthrow of regimes in developing nations where Eurorient conducted business. Plaintiffs alleged Li's conduct caused the loss of multi-million dollar investment opportunities and endangered Eurorient's employees and operations in China and Vietnam.

Over the next five months, Martin Horwitz, Li's attorney, believing ongoing negotiations would result in a settlement, failed to respond to the complaint. At a November case management conference, the trial court ordered plaintiffs' counsel, Andrew McCarron, not to grant any extension of time and to obtain Li's response or take her default. McCarron subsequently filed a request for entry of default, which the court clerk rejected, apparently due to improper notice. In December, the trial court again admonished McCarron to obtain Li's default, and in February 2014 ordered McCarron

[1] Li is also known as Lee.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

"to move forward on [the] default issue (notwithstanding settlement talks)." The court also scheduled an order to show cause (OSC) re dismissal hearing for March 26, 2014.

In November and December 2013 and January, February and March 2014, McCarron sent serial versions of the evolving settlement agreement to Horwitz, gave him notice of all court orders, and requested several times that Li either accept the agreement or answer the complaint, advising that if she failed to do one or the other, plaintiffs would be constrained to seek her default. On March 12, 2014, McCarron wrote Horwitz the following: "Given that there is a court appearance on March 26, 2014, and by court order there either needs to be an answer or a default taken by that time, please advise me of your client's agreement to the settlement agreement . . . . If it is not agreeable to her, you will need to file an answer by March 19, 2014; otherwise I will be forced to file a default pursuant to the court's order."

Two days later, Horwitz returned a redlined settlement agreement with changes that plaintiffs deemed unacceptable. McCarron thereafter attempted multiple times on March 14, 17 and 18 to contact Horwitz by telephone and email, leaving messages that if he failed to accept the settlement or file an answer, plaintiffs would seek Li's default on March 19. Horwitz failed to respond.

Plaintiffs requested entry of Li's default on March 19, 2014. The request was granted, but the default was not entered until April 2.[3] At the March 26 OSC hearing, the trial court sanctioned plaintiffs' counsel $355 for failing to ensure default was entered by the time of the hearing. Li did not appear at the hearing.

On March 31, 2014, Horwitz informed McCarron he intended to file a special motion to strike the complaint under Code of Civil Procedure section 425.16, representing the motion was not yet complete and requesting a stipulation for relief from entry of default. McCarron denied the request on the ground that Horwitz had made a strategic decision not to respond to his communications in the hope that the trial court

[3] The reason for the delay is unclear.

would dismiss the case at the OSC hearing. On April 3, Horwitz presented an ex parte application for leave to file the proposed motion to strike, which the trial court denied.

On April 23, 2014, Li filed a motion to set aside entry of default pursuant to section 473, accompanying the motion with a proposed special motion to strike and a declaration of attorney fault. In the notice, Li stated the motion was "made on the grounds that the default was taken against Lee as a result of 'mistake, inadvertence, surprise or neglect' as provided for under [section 473]." The notice stated the motion was based on the notice of motion, the accompanying memorandum of points and authorities, and Horwitz's declaration.

In the memorandum of points and authorities, Li argued her default should be set aside due to "*Defendant's*" mistake, inadvertence, surprise, or "*excusable* neglect," and argued such relief was "within the sound discretion of the trial court" and should be granted because Li had a "satisfactory excuse" for failing to defend the action. (Italics added, punctuation corrected.)

In the attorney fault declaration, Horwitz complained about McCarron's communication and negotiation behavior and stated he believed McCarron's representations to him about looming litigation deadlines had been mere negotiating ploys. He recited several communications he made to McCarron from November 2013 to March 2014, ignored his refusal to communicate with McCarron after March 14, and claimed it was a "complete surprise" to him that McCarron would seek entry of Li's default prior to the March 26 dismissal hearing.

Referencing McCarron's letter of March 12, Horwitz claimed McCarron led him to believe he had until the March 26 OSC hearing to file a responsive pleading, in that he had said there needed to be either an answer or a default taken "by that time," i.e., by the time of the hearing. (Horwitz ignored the next sentence of the letter, in which McCarron stated Li's answer would need to be filed by March 19.) Referencing McCarron's communication of March 18 stating a default would be sought the next day, Horwitz complained it was unreasonable to be given only one day to draft and file a special motion to strike.

Horwitz argued that his failure to respond to the complaint resulted from "excusable neglect," a phrase he used twice. Although he admitted he had made a mistake, he complained he did so "based on" the trial court's notice of the OSC and McCarron's representations. For example, Horwitz declared the court appearance notice had stated: "Notice is hereby given that an Order to Show Cause Re: Dismissal of Case and/or Notice of Entry of Judgment against Defendant Xiaoxi Li aka Cecilia Lee in the above-referenced matter is scheduled for March 26, 2014." Horwitz argued it was "not entirely clear" from that notice that a response to the complaint would be required before March 26. He also declared that plaintiffs' request for entry of default precluded him from filing a response prior to the dismissal hearing.

Plaintiffs opposed Li's section 473 motion, arguing Horwitz had not in fact made any mistake, and his neglect was inexcusable because he had made a tactical decision not to answer the complaint, gambling either on the trial court dismissing the action at the March 26 OSC hearing (because default had not been entered by then) or granting section 473 relief.

The trial court found it unclear whether Li sought relief pursuant to the discretionary or mandatory provisions of section 473 because the motion contained trappings of both: an attorney declaration on the one hand; and on the other, statements that Horwitz's neglect was excusable and a request that the court exercise its discretion and grant relief. Citing *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, the court construed the motion as seeking only discretionary relief. It found that in light of McCarron's "repeated[] and consistent[] communications concerning both Plaintiffs seeking entry of default against Cecilia Lee and the need for Cecilia Lee to file a response to the Complaint," it was inexcusable not to respond. The court therefore denied Li's motion.

On June 1, 2014, the trial court entered a default judgment against Li in the amount of $1 million. Li timely appealed.

DISCUSSION

Subdivision (b) of section 473 provides for two different types of relief. "Under the discretionary relief provision, on a showing of 'mistake, inadvertence, surprise, or excusable neglect,' the court has discretion to allow relief from a 'judgment, dismissal, order, or other proceeding taken against' a party or his or her attorney. Under the mandatory relief provision, on the other hand, upon a showing by attorney declaration of 'mistake, inadvertence, surprise, or neglect,' the court shall vacate any 'resulting default judgment or dismissal entered.'" (*Leader v. Health Industries of America, Inc*. (2001) 89 Cal.App.4th 603, 615-616, quoting § 473.) "The range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes inexcusable neglect. But the range of adverse litigation results from which relief can be granted is narrower. Mandatory relief only extends to *vacating* a default which will result in the entry of a default judgment, a default judgment, or an *entered* dismissal." (*Id*. at p. 616.) Mandatory relief from default will be granted "unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).) If it is granted, the court shall "direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." (*Ibid*.) "The law strongly favors trial and disposition on the merits. Therefore, any doubts in applying section 473 must be resolved in favor of the party seeking relief. When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief. We will more carefully scrutinize an order denying relief than one which permits a trial on the merits." (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343.)

1. *Li sought both discretionary and mandatory relief*

The trial court found it was unclear whether Li sought relief pursuant to the discretionary or mandatory provisions of section 473. Li stated in her points and authorities that the default resulted from *her* neglect, which she said was excusable, and argued relief was "within the sound discretion of the trial court" and should be granted because she had a "satisfactory excuse" for failing to defend the action. This seemed

aimed to satisfy the discretionary provision of section 473, under which relief may be granted where a default is taken due to the party's own excusable neglect. On the other hand, the notice of motion quoted directly from the mandatory provision of section 473, seeking relief based on "'mistake, inadvertence, surprise, or neglect'" (omitting "excusable"), and the motion was accompanied by an attorney declaration of fault, which is required only pursuant to the mandatory provision.

The trial court erred in construing Li's motion as seeking only discretionary relief. In *Luri v. Greenwald*, *supra*, upon which the court relied, a defendant who had failed to oppose summary judgment motions sought section 473 relief from orders granting the motions. No notice of motion accompanied the section 473 motion, and the points and authorities devoted to it read in its entirety as follows: "'Motion under Section 473 CCP [P] (Excusable Neglect) [P] The evidence and argument for the grounds of ex[]cusable neglect both as to the non-appearance and the filing of Opposition is provided by Declaration of [the attorney] filed concurrently her[e]with.'" (*Luri v. Greenwald*, *supra*, 107 Cal.App.4th at p. 1123.) On appeal, the defendant argued that even though her section 473 motion referred only to discretionary relief, it should have been treated as seeking mandatory relief because it was accompanied by an attorney declaration of fault. (*Luri v. Greenwald*, *supra*, 107 Cal.App.4th at p. 1124.)

The appellate court disagreed: "A basic principle of motion practice is that the moving party must specify for the court and the opposing party the grounds upon which that party seeks relief. Code of Civil Procedure section 1010 requires that a notice of motion must state 'the grounds upon which it will be made.' California Rules of Court, rule 311 requires a notice of motion to state in its opening paragraph 'the nature of the order being sought and the grounds for issuance of the order.'" "The purpose of these requirements is to cause the moving party to 'sufficiently define the issues for the information and attention of the adverse party and the court.'" (*Luri v. Greenwald, supra,* 107 Cal.App.4th at p. 1125.) The court "decline[d] to hold that in evaluating motions made under section 473, the trial court must consider grounds for relief not raised or sought by the moving party." (*Ibid*.)

In contrast to the defendant's motion in *Luri v. Greenwald*, Li's motion contained a notice of motion that stated the grounds for relief: "The motion is made on the grounds that the default was taken against Lee as a result of 'mistake, inadvertence, surprise or neglect' as provided for under [section 473]." Section 473 provides that "mistake, inadvertence, surprise or neglect" are grounds for mandatory, not discretionary relief. Giving the moving party the benefit of any doubt regarding application of section 473 (*Mink v. Superior Court, supra*, 2 Cal.App.4th at p. 1343), we conclude the notice of motion adequately informed plaintiffs and the trial court that mandatory relief was sought.

To be sure, Li confused the issue by referring in her points and authorities and attorney declaration only to discretionary relief. But this expanded, not restricted, the grounds upon which relief was sought. Although "[a]n *omission* in the notice may be overlooked if the supporting papers make clear the grounds for the relief sought" (*Luri v. Greenwald*, *supra*, 107 Cal.App.4th at p. 1125, italics added; *366-386 Geary St., L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1200), we are aware of no authority, and respondents direct us to none, permitting a trial court to ignore the grounds for relief stated in a notice of motion simply because different or additional grounds appear in the supporting papers.

Considering Li's notice of motion and supporting papers together, it is apparent she sought both mandatory and discretionary relief.

2. *Li was not entitled to discretionary relief*

Li argues she is entitled to relief under the discretionary provision of section 473 as a result of mistake, inadvertence, surprise or excusable neglect on the part of her counsel in failing to file a response to the complaint. We disagree.

To find an attorney's conduct was excusable such that discretionary relief is warranted the trial court must determine that "a reasonably prudent person might have made the same mistake under the same or similar circumstances." (*Henderson v. Pacific Gas & Electric Co*. (2010) 187 Cal.App.4th 215, 229.) "Generally speaking, the trial court's ruling on a discretionary motion for relief is reviewed for an abuse of discretion."

(*Id*. at p. 230.) But because the law strongly favors trial and disposition on the merits, "'a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.'" (*Ibid*.)

Under this standard, it cannot reasonably be contended that the trial court erred in finding Horwitz did not act out of *excusable* neglect. There was credible evidence that he was aware plaintiffs intended to take Li's default if a response was not filed by March 18, 2014. McCarron also gave notice that the trial court had ordered him not to grant an extension of time to respond and to move forward with the default notwithstanding settlement negotiations. In light of these communications, a reasonable attorney would assume McCarron's threat would be carried out, and certainly the trial court did not abuse its discretion in so finding. Li is not entitled to relief on this basis.

3. *Li was Entitled to Mandatory Relief*

We turn to whether Li was entitled to mandatory relief.

"To obtain mandatory relief under section 473, plaintiffs' counsel need not show that his or her mistake, inadvertence, surprise or neglect was excusable. No reason need be given for the existence of one of these circumstances. Attestation that one of these reasons existed is sufficient to obtain relief, unless the trial court finds that the dismissal did not occur because of these reasons." (*Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1660.) "The purpose of the attorney affidavit provision 'is to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits.'" (*Lorenz v. Commercial Acceptance Ins. Co*. (1995) 40 Cal.App.4th 981, 990.)

It is undisputed Horwitz, not Li, caused Li's default. Even though his declaration did not plainly and unequivocally admit fault, Horwitz admitted he made mistakes and explicitly absolved Li of any responsibility for the failure to answer. Further, he promptly sought section 473 relief, and a grant of such relief will in no way prejudice plaintiffs. Li thus satisfies the mandatory relief provision of section 473.

Plaintiffs argue the default was not in fact caused by Horwitz's mistake, inadvertence, surprise, or neglect, but rather by his deliberate, tactical decision not to

respond to the complaint in the hope that the trial court would dismiss the case on March 26 if default was not entered by then.

Plaintiffs' argument is unsupported by any finding of fact below. Although plaintiffs' attorneys declared and argued that Horwitz deliberately ignored them, the trial court made no such finding, merely finding his neglect was inexcusable. We need not remand the matter for a factual finding on this issue, however, because even under plaintiffs' theory, relief from default is mandatory.

In *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003 (*Solv-All*), counsel for the defendants failed to file an answer because settlement negotiations were ongoing and counsel believed no answer was expected. The plaintiff's counsel disputed the reasonableness of this belief, declaring she had warned the attorney that entry of default was imminent if no response to the complaint was received. Plaintiff's counsel opined that defense counsel had deliberately dragged his feet to avoid paying plaintiff's claim. The default therefore resulted not from mistake or neglect, but from improper strategy. (*Id*. at p. 1006.)

The appellate court held that the phrase "mistake, inadvertence, surprise, or neglect" should be broadly defined so as to include improper strategy. (*Solv-All*, *supra*, 131 Cal.App.4th at p. 1010.) Although the term "negligence" in the law "implies a careless, but unintentional, failure to act with due care," the court stated, "the word 'neglect' is less limited. A child or dog, for example, may be *intentionally* 'neglected.' . . . [D]efinitions of 'neglect' . . . cover both inadvertent and deliberate acts or omissions: 'to fail to attend to sufficiently or properly . . . ; to carelessly omit doing (something that should be done) . . . leave undone or unattended to through carelessness *or intention*.' [Citation.] It is the latter portion of the second definition which most effectively carries out the legislative purpose in enacting the 'attorney fault' provisions. From the client's point of view, it doesn't matter a whit whether the default was due to gross carelessness or bad strategy; either way, the client is the one stuck with the judgment resulting from the attorney's error. In both cases, it is the attorney's 'neglect' to carry out his duty to his

client that causes the problem. In both cases, the client should be entitled to relief if the attorney admits that the inaction was his responsibility." (*Ibid*.)

We agree. Even if Horwitz deliberately chose not to respond to the complaint, hoping it might be dismissed because default had not been entered by the trial court's March 26, 2014 deadline, his conduct amounted at most to calculated neglect based on a mistaken supposition about what the court would do at the OSC hearing.

Jerry's Shell v. Equilon Enterprises, LLC (2005) 134 Cal.App.4th 1058, upon which plaintiffs rely, is distinguishable. There, the plaintiffs' attorney repeatedly failed to respond to discovery or comply with court orders compelling discovery, which ultimately resulted in terminating sanctions against her clients. (*Id*. at p. 1064.) The appellate court held the clients were not entitled to mandatory section 473 relief because granting such relief "would be rewarding and encouraging this wholly improper conduct. A party cannot justly be permitted to seek relief under section 473(b) from sanctions imposed for deliberate failure to respond to discovery or oppose discovery motions." (*Id*. at p. 1074.) Here, Horwitz took no action to avail himself of the court's processes—he was the defendant's attorney, not the plaintiffs', disobeyed no court order, and committed no wrongful conduct such as would subject him to discovery sanctions. At most, he hoped, mistakenly, that plaintiffs' counsel's inability to obtain a timely default would redound to his client's benefit.

Pagarigan v. Aetna U.S. Healthcare of California, Inc. (2007) 158 Cal.App.4th 38 (*Pagarigan*), upon with plaintiffs also rely, is also distinguishable. There, the plaintiffs' attorney failed timely to amend the complaint after a demurrer was sustained with leave to amend, resulting in dismissal of the action. The trial court found the attorney's decision not to file an amended complaint was deliberate and strategic, not mistaken or neglectful, based on two facts: the statutory time limit for amendment was clear and plaintiffs had evinced a desire to stay all proceedings pending resolution of an appeal in the same case involving different defendants. (*Id*. at p. 45.) Division Seven of this District held plaintiffs were not entitled to mandatory section 473 relief in part because

"[d]esigning conduct is not mistake, inadvertence, surprise, or neglect."[4] (*Pagarigan*, *supra*, 158 Cal.App.4th at p. 45.)

The *Pagarigan* attorney, who had no reason to suppose the trial court would entertain any delay in proceedings, deliberately put a halt to his own litigation. In contrast, Horwitz delayed answering another's complaint because (under plaintiffs' theory) he hoped it would be dismissed—as the trial court had intimated it would be—thus making a conscious decision to let proceedings take their anticipated course. His mistake was in betting on the wrong outcome. Horwitz's gamble was inexcusable, because the time limit for filing an answer is clear, and does not allow for strategic extensions. But reading section 473 broadly and resolving doubts in favor of the defaulting party, we conclude Li should not be penalized for it.[5]

Plaintiffs also rely on *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, which is inapposite. There, the issue was not whether the attorney's conduct amounted to neglect, but whether the admitted neglect was committed by the attorney at all, as opposed to the client. The trial court found that the plaintiff's failure to answer the complaint could not be attributed to the attorney because the attorney had not been retained until after the deadline to answer had passed. (*Id*. at pp. 911, 915.)

In sum, we think the dual policies that matters be tried on the merits and clients be shielded from some of the consequences of some of their attorneys' errors prevents us from drawing in this case a practical distinction—for section 473 purposes—between inexcusable neglect and deliberate but misguided tactics. We note Horwitz's conduct will not be without consequence, as mandatory relief based on attorney fault comes with

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[4] Alternatively, the court held that "[d]esigning conduct that leads to a dismissal is not akin to a default." (*Pagarigan*, *supra*, 158 Cal.App.4th at p. 46.)

[5] The other cases cited by plaintiffs that suggest a strategic decision or deliberate tactic might not justify section 473 relief are also distinguishable. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 608-610 [no "straightforward admission of fault" the attorney seeking relief]; c.f. *Avila v. Chua* (1997) 57 Cal.App.4th 860, 869 [no showing of deliberate, tactical delay].)

the obligation to "pay reasonable compensatory legal fees and costs to opposing counsel or parties." We will remand the matter for further proceedings to determine the amount of such fees and costs.

DISPOSITION

The judgment is reversed. On remand, the trial court is ordered to vacate Li's default and determine the amount of reasonable compensatory legal fees due to plaintiffs or their attorneys from Horwitz. Li is to recover her costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.